

Balancing Protection & Power

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Advance Directives

POAs: Basic Requirements

- Who can create one?
 - Any adult of sound mind; cannot create a POA for another person
 - Voluntary and can be revoked at any time
- Who makes decisions?
 - Health care: agent when it is activated
 - Financial: agent and/or individual depending on how it's activated
- What decisions can they make?
 - Only what the document authorizes
- What are the signature requirements?
 - Must be in writing, signed and dated by the individual
 - Health care: two disinterested witnesses
 - Financial: no witnesses needed but strongly recommend getting it notarized

POAs: Sound Mind

- What does “of sound mind” mean?
 - Generally means they understand nature of the document and at least have periods of lucidity
 - Low standard
 - Judgment call of the 2 witnesses for POA-HC or notary for POA-F
 - Only time presumed not to be of sound mind for POA-HC is if they have a guardian of the person
- Board on Aging & Long-Term Care position – sound mind can exist after activation

POAs: Agents, Co-Agents, Successor Agents

- POA-HC:
 - Agent should be a named individual –no agents by position, e.g., “priest of my parish at time of activation”
 - Statutes are silent on co-agents
 - Agent may not designate a successor
- POA-F:
 - Can have co-agents
 - Agent can be an organization or position by title
 - POA may give the agent authority to designate a successor

POAs: Activation

- Health care – incapacity
 - Inability to receive/evaluate information and/or communicate decisions relating to health care decisions
 - Determined by 2 physicians or physician and advanced practice clinician (psychologist, nurse practitioner, physician assistant) OR as stated on POA document itself
- Financial
 - Typically active immediately on signing, BUT can be “springing” – set to activate on incapacity or specific event
 - For POA-F, “incapacity” means inability of an individual to manage property, finances, or business affairs because of an impairment or some other criteria – e.g., person is missing, incarcerated, etc.
 - Only requires one physician to activate if activation is based on impairment

POAs: Authority

- Health care – health care decisions only
 - “Health care” means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition. Wis. Stat. §155.01
 - Must follow wishes of individual where known or expressed at any time
- Financial – as outlined in document
 - Must follow reasonable expectations of the individual for property management
 - Limitations on gifting, self-dealing, etc. written into statute – agent must have explicit authority

POAs: Protections

- Right to have stated wishes followed
 - Provides a check on agent authority – POA does not remove rights; agent authority is not unlimited
- Limits on agent gifting/self-dealing
- Revocation
 - Individual may revoke at any time – even after incapacity
 - May or may not be able to create a new one
- Court review of agent's actions
- Other court action: guardianship/protective placement

POA Legal Safeguards

- Interested party can petition for court review
- Court can:
 - Determine whether POA is valid
 - Settle conflicts between competing POA-F documents
 - Review conduct of agent
 - Require agent to report to court and/or provide accounting
 - Remove agent
 - Order agent to follow the POA document
 - Order agent to return money

Deactivation vs. Revocation (POAs)

- Deactivation
 - Means individual has regained capacity
 - No formal process – up to facility/provider to determine how they want to note this
 - Document available to use if individual becomes incapacitated again
- Revocation
 - Individual removes authority from the agent(s)
 - Can be done at any time – even after incapacity
 - Methods: destroy document, sign statement indicating intent to revoke, state intention to two witnesses, execute new POA-HC (but POA-F does not automatically revoke previous POA-F!)

POAs From Other States

- WI will recognize both POA-HC and POA-F from other states as long as validly executed in that state
- Signature requirements may be different
- Activation requirements may be different – follow document
- Lack of WI specific directives for long-term care/end of life doesn't invalidate – agent just doesn't have authority in those areas

The background of the top half of the image is a solid dark blue. On the left side, there is a vertical bar of a slightly lighter blue color. On the right side, there is a large, semi-transparent circle in a medium blue shade. The word "Guardianship" is written in white, sans-serif font, centered horizontally in the upper half of the image.

Guardianship

Guardianship

- Court process – only a court can appoint a guardian
- Can be temporary (60-120 days) or permanent
- Determines whether an adult meets the standard for incompetency
 - Temp: Individual “is likely to be incompetent” – does not need full eval
- Determines whether individual’s advance directives (if any) are valid and sufficient to meet their needs
- Appoints a legal decision-maker, who is subject to court oversight and review
- Determines what authority the legal decision-maker will have

Guardianship: What is Incompetency?

- Individual has a long-term or permanent impairment
 - Developmental disability, serious and persistent mental illness, degenerative brain disorder, “other like incapacities” – e.g., TBI, stroke, ongoing substance abuse, any condition that impairs individual from providing for their own care/custody
- Impairment results in inability to receive/evaluate information or communicate decisions
- Unable to meet essential needs for health and safety and/or
- Unable to provide for own support or prevent financial exploitation
- No less restrictive alternatives available

Advance Directives and Guardianship

- Court may leave POAs in place when appointing guardian
- Guardianship does not invalidate a living will
- Guardian authority goes beyond advance directive documents
- Guardian must make decision in individual's best interest
- WI courts have indicated that “where a ward's wishes regarding medical treatment can be determined by a preponderance of the evidence, then it is in the ward's best interest to have those wishes honored.”
 - In re Edna M.F. (Spahn v. Eisenberg), 210 Wis. 2d 557, 569 (1997)

Guardianship Limitations

- Guardian cannot consent to psych treatment or meds over individual's objection
 - Treatment: ch. 51; meds: 51 or 55 (protective service)
- Guardian cannot place for long-term care in facility ≥ 16 beds, or a facility of any size if ward objects
 - Requires protective placement order; guardian may place while petition is pending
 - Cannot protectively place to psych units/facilities
- Guardian cannot place for short-term care (60-120 days) if primary purpose is treatment of mental illness or developmental disability
- Guardian cannot gift and may need court permission for certain other actions (such as selling real estate)
- Guardian has only authority granted to them in the order

Balancing Protection & Power

Competing Interests

- Protection

- Ensure adequate and timely access to health care
- Prevent abuse/exploitation
- Protect from neglect/self-neglect

- Self-Determination

- Ensure that individual's wishes are honored
- Ensure individual has a voice in treatment decisions and living situation
- Protection from decision-maker overreach

Working with Vulnerable Adults

- Decisional capacity for specific issue (understanding of risk)
- Foreseeable harm
 - Nature of harm, likelihood of harm, person's willingness to accept mitigation options
- Negotiating risk
 - What options exist?
 - Reasonable steps taken to prevent harm?
 - Conditions that could lead to risk, education/motivation to reduce risk
- Medical/mental health prognosis

Working with Decision-Makers

- POAs: review decision-making standard – are individual's wishes known? Is agent following them?
- Questionable POAs: who were the witnesses? What were the circumstances? Is individual able to express opinion about agent/agent's actions?
- Guardians: what is the scope of the order? What are the individual's wishes? What is the least restrictive option?

Right to Refuse Care

- POAs:
 - Ch. 155 retains right to refuse care – POA standard notice reiterates “no care may be given or withheld over your objection”
 - What if the refusal puts individual at risk of imminent harm?
- Guardianship:
 - Guardian has authority to override in at least some situations – but should they?
- Both:
 - What if it is not clear whether individual is actually objecting to care?
 - Is it possible to determine the reasons for refusal and address in a way that will allow care to move forward?

WI Guardianship Support Center

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